UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NORMAN JENKINS,

Plaintiff,

v. 13 CV 3405 (KPF)

NEW YORK CITY POLICE DEPARTMENT, et al.,

Defendants.

----------x

New York, N.Y.
June 19, 2014
1:35 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

ROBERT J. BOYLE
Attorney for Plaintiff
-AND-
GIDEON ORION OLIVER

ZACHARY W. CARTER
Corporation Counsel of the City of New York
BY: BRIAN JEREMY FARRAR
Assistant Corporation Counsel

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
BY: CHRISTINA ANTE

THE DEPUTY CLERK: In the matter of Norman Jenkins versus New York City Police Department, et al.

Counsel, if you could please identify yourselves for the record, beginning with the plaintiff.

MR. BOYLE: For Mr. Jenkins, Robert Boyle, 351 Broadway. Good afternoon, your Honor.

THE COURT: Good afternoon, sir.

MR. OLIVER: And also for Mr. Jenkins, Gideon Oliver, 351 Broadway. Good afternoon, your Honor.

MR. FARRAR: Good afternoon, your Honor. Brian Farrar, for the defendant, Police Officers Victor Charles, Robert Agate and Ramiro Ruiz.

THE COURT: Good afternoon, sir.

MS. ANTE: And Assistant District Attorney Christina Ante of the New York City County District Attorney's Office. We are a nonparty in this proceeding, your Honor.

THE COURT: I would consider you an interested party in the proceeding.

MS. ANTE: Yes.

THE COURT: All right. Thank you.

I don't think my luck is this strong, but has there been a finding, a citing, of Mr. Jenkins' criminal court case file?

MR. FARRAR: No, your Honor. The last correspondence that we received from the criminal court, I forwarded to

plaintiff's counsel basically stating that they, for whatever reason, cannot find it. I have been following up with them, and it's been difficult getting -- for whatever reason, having them locate it.

THE COURT: OK. I was given a privilege log as an attachment to one of these letters, and it listed nine or so categories of documents.

Can I assume before we begin this discussion, that the parties have reached agreement on none of these categories?

MR. OLIVER: No, your Honor. Actually, we have reached -- we are just going to be talking today about numbers 2, 3 and 6.

THE COURT: Wait. The Court notes, sir? I want to make sure we're talking about the same thing.

MR. OLIVER: Exactly, your Honor, the court notes. And number 2, the grand jury subpoenas and accompanying cover letters identified in item 3 in the privilege log, and the notification for the officers to appear in number 6 of the privilege log. All of the other items, we have either resolved or we're no longer going to pursue.

THE COURT: All right. Well, I thank the parties, because that means that progress has been made since the letter-writing, and I appreciate that very much.

It seems to me that the third and the sixth categories can be discussed at the same time, Mr. Oliver. If you're

taking the laboring oar, sir, because, really, you want information about who appeared before the grand jury, and they wish not to tell you.

Am I understanding that correctly? Mr. Boyle?

MR. BOYLE: Good afternoon, your Honor. I'm going to address the grand jury matter.

THE COURT: Yes.

MR. BOYLE: We are primarily interested in number 3, with respect to had these defendants; that is, the named defendants, actually received subpoenas to appear before the grand jury. There is an issue here with respect to why this criminal case was never presented, why it was allowed to die, what they call a speedy trial statute, New York statutory speedy trial death. And we have a situation where it was alleged that Mr. Jenkins had a large number of crack vials on his person discovered after his arrest. We also allege that it was planted. It was something that could have very easily been indicted.

We understand that there is a concession that the case was never presented, but we do think it's -- the officers could not recall in their depositions whether they ever received subpoenas, whether they ever received notifications.

I guess we're thinking forward to trial, is there a going to be a claim that, well, it was just logistics, this is why it was never presented, or was there a strategic decision

made just to let this case go away for other reasons.

And that's why we would at least like to know whether these officers -- only the named officers, because we understand that there is some secrecy that attached here -- received subpoenas and received and/or notifications to come to court.

THE COURT: And, actually, to make sure I understand your inquiry, Mr. Boyle, you don't care whether they abided by or followed those notifications, you don't care whether they showed up or testified, you just want to know whether they were asked to show up, sir?

MR. BOYLE: Yes, your Honor.

THE COURT: And can I -- just so my recollection is refreshed, there is a malicious prosecution claim here?

MR. BOYLE: Yes.

THE COURT: Is there a denial of fair trial claim here?

MR. BOYLE: No, your Honor, because it was statutorily dismissed. So there was no denial-- there was no trial that took place. There was -- in other words, no Brady or any of those legal grounds have come up in a denial of a fair pretrial. It's malicious prosecution.

THE COURT: Let me understand, before I speak to the folks at the back table, a little bit more about how the presence or absence of these subpoenas relates to your

malicious prosecution claim.

MR. BOYLE: It relates to it in this way: I think it would come up in terms to rebut any defense that they might put forward that, well, we would have shown up if we were only notified. And so to that extent, it might lead to admissible evidence if we could show, well, in fact, they were served, it was pursued, or there was a decision not to do that.

I think clearly here, because the case was dismissed -- I mean, that's a predicate for the malicious prosecution claim, and that's going to be conceded, but the issue is going to be why and whether there was probable cause to begin with, because that's obviously -- even though the case was dismissed, we have to show lack of probable cause for the prosecution.

THE COURT: I'm even with you on that front, sir. I guess my question is: I see as analytically distinct the question of the existence or not of probable cause and whether or not these gentlemen were summoned to the grand jury. I wonder if perhaps it may go to an -- I'm not sure where it goes, let me stop saying that. But I see your point, but it seems to me that if the City or the officers were to prove that probable cause existed for the offense, however they chose to do that, I don't know how it would matter whether or not they were given the subpoenas to go to the grand jury.

I do understand your argument, which I think is a

little bit different than the probable cause argument, which is you are trying to know in advance or trying to avoid being blindsided on the issue of whether or not -- whether they will say, oh, we would have shown up if only we had known. That I get, but I guess I don't see the interrelationship with the probable cause inquiry in the way that you do.

MR. BOYLE: And also, the question of malice, I think --

THE COURT: Yes.

MR. BOYLE: -- as well, whether they were notified to show up, whether the prosecutor issued those subpoenas and were they served, or did they receive the notification.

Actually, I don't even know if these grand jury subpoenas -- at this point we don't even know if they relate to the defendants because sometimes police officers are just issued notification to appear in court, which I think less of a privilege would apply to, frankly, because it's just a notification to come to court. It also may go to malice as well.

THE COURT: Assume that Mr. Farrar tells me that they are not going to make the argument at trial that they would have come to the grand jury if only they had known, what, then, is the relevance of this material to your case?

MR. BOYLE: May I have a moment?

THE COURT: Of course.

(Pause)

MR. BOYLE: It may very well go to their credibility and also to be able to argue to the jury if they --

THE COURT: You're not moving me on that one, sir. I've got to tell you. Try again.

MR. BOYLE: We want to be able to argue to the jury, if they were informed -- let's say that there was a subpoena in their name or they did receive notification, we would want to be able to argue to the jury, well, you got notification, and for some reason, you didn't show up. Why was it that you didn't show up, Officer Charles? Is it because you didn't want to repeat a false story under oath, and you scheduled your regular day off?

These are all the kinds of things -- and it's hard at this point when we're in this posture, because we don't know what, in fact, they're going to say or what the arguments would be, to put it any more specifically, but I can certainly say that would be something we would be able to or would want to argue in that regard.

THE COURT: OK. Thank you.

Mr. Farrar, may I hear from you first, sir?

MR. FARRAR: Yes, your Honor.

THE COURT: In your letter to me of June 3rd, you say that plaintiff's statement about what it is you have implied that you will do is inaccurate and incorrect. What is accurate

and what is correct, sir?

MR. FARRAR: Your Honor, I won't speak to the privilege issues, I'll leave that to Ms. Ante here.

THE COURT: Absolutely.

MR. FARRAR: But it's been our position all along that the district attorney's file it, and their reasons for doing something or not doing something are not relevant at all to this action. We never intended to make that an issue because it's our position that plaintiff's false arrest, and to some extent, his malicious prosecution claim, they turn on whether or not the jury is going to believe the officers' version of events regarding what their testimony is.

So turning first to the false arrest claim, the issue is -- the only issue for the jury to decide is whether there was probable cause to arrest the plaintiff at the time of his arrest, which would be determined not by any decision made by the district attorney's office.

THE COURT: Is the existence of probable cause a complete defense to the malicious prosecution charge even if the officers acted with malice?

MR. FARRAR: It's my understanding in order for the plaintiff to prevail on a malicious prosecution claim, there are several elements they have to prove. The first would be that the defendants commenced a criminal proceeding against the plaintiff. The second is they would have to show that in doing

so, the officers forwarded false information to the district attorney. And I believe the third element is that it was a favorable termination, which is not -- the third element is not in dispute.

THE COURT: No, the third element is not in dispute. The element of commencing proceedings is not in dispute. I thought there was a --

MR. FARRAR: Your Honor, if I may --

THE COURT: Yes.

MR. FARRAR: -- we still argue that it's the district attorney that commences prosecution for purposes of these matters.

THE COURT: OK. I understand that point. But then we're just going to get into a jury issue as to whether they assisted to such a degree, that they can be brought within that ambit, because that's what I understand the jury instructions on malicious prosecution to specify.

Do I understand from what you have just said, sir, that you are not going to be arguing on behalf of the officers that they would have shown up if only they had known about these requests?

MR. FARRAR: It's a little hard to think about it, I guess, in hypothetical terms. Right now, that's not our intention to put that forward, and I can't imagine any situation where that argument would come out. We would be

proving probable cause based on the testimony of the officers.

And I think there's case law that even says the opinions of the district attorney's are not admissible. And certain opinions about the credibility of the officers is even reversible error should the district attorney put forth evidence in a 1983 action about their view of the credibility of the officers. So we would argue that that should be precluded at trial.

THE COURT: Well, I didn't think they were asking for those materials. I think they just want a yes-or-no answer as to whether these folks were summoned to the grand jury or not, whether formally or informally. So I'd like you to speak to the question of why that's not relevant. You've started to do that.

MR. FARRAR: I think in doing so, their argument will be -- eventually I think the road that they're trying to go down is that the DA didn't believe these officers, and the reason that the prosecution didn't go forward was because for some reason, the DA found that the officers were not credible.

I don't know if that's their intention, but it seems to me based on what's been represented thus far, that that is going to be their argument. We would argue that that is inadmissible, and that the opinions of the office of the district attorney are not admissible, and why they did or didn't notify an officer is not relevant.

THE COURT: I guess I have two responses to that. The first is going back to your prior answer to me. To the extent that I make the decision not to produce these materials -- and I haven't decided yet -- based on my understanding that at the present time, your office is not going to make any argument that these folks would have come if only they had known, please understand that it would be unfortunate if you were to reverse yourself at trial and suddenly make this an argument.

MR. FARRAR: No, I completely understand your Honor's --

THE COURT: There's sort of an estoppel point on my side.

Secondly, I think the argument they're making is not what you have just said, but a little bit different. It may be that they care about the district attorney's office's views of the credibility of the individual defendants in this case, but what they've just articulated to me as a second reason why they believe they need this information is that they want to demonstrate that the officers knew that they had been summoned, and that the officers, irrespective of what the district attorney's office might have viewed as their credibility or lack thereof, that they elected not to -- they decided not to show because they did not want to be put in the position of having to repeat a false submitted that had already been stated to the district attorney's office. That's what I understand

one of their arguments to be, and I'd like you to respond to that, please, sir.

MR. FARRAR: If the argument, as I understand that, would be that the officers were notified for grand jury, and then they didn't show up, your Honor, at the moment --

THE COURT: You could argue very speculative Rule 403, all of those things. Those answers, I know. If you have another answer --

MR. FARRAR: Those are the first that came to mind, so I can't think of anything else besides that. It would just get back to our original point that this is not relevant and, I think, getting outside really the scope of discovery some of the discovery that the plaintiff is pursuing.

THE COURT: OK. Mr. Farrar, a second issue: If, indeed, this is not relevant material, why were the officers permitted to answer questions about whether they had been summoned to testify, formally or informally, by which I mean the summons not the testimony, before the grand jury?

MR. FARRAR: Well, I have to check the transcript of the deposition. I don't recall if there was an objection to those questions. There may have been. But I think in that point, it would still be their answer -- it would be, if they were giving testimony, that that's their recollection, but as far as whether or not they were summoned to testify, I don't know what the documents will show.

THE COURT: My point, sir, is: You all are here now because you wish not to produce documents evidencing a summons -- I use that term broadly -- to come to testify before the grand jury. And I understand that. Your argument is weakened, sir, or at least your position with respect to the argument is weakened if you are letting them answer a series of questions about being summoned, formally or informally, to testify before the grand jury. That's my point.

MR. FARRAR: Yes, your Honor.

THE COURT: So that is what is of interest to me.

Were you there for those depositions, sir?

MR. FARRAR: I was. I defended the depositions. And off the top of my head, I don't recall if I objected to those questions. I would have to review the transcript to see. But I understand your Honor's point in that regard.

THE COURT: Thank you.

Let me hear from Ms. Ante, please.

MS. ANTE: Yes, your Honor. With regard to the privilege log, first off with number 3, the grand jury subpoenas, it is the People's -- the district attorney's position that any disclosure of grand jury materials, any requests for that has to be directed to the state court and not the federal court, and that's under Douglas Oil versus Petrol, 441 U.S. 211 (1979), and also Ruther v. Boyle, 879 F. Supp. 247, 250 (E.D.N.Y. 1995).

So it's the district attorney's position that any request regarding grand jury material should be made before the grand jury judge that supervised this. Regardless -- and from hearing from the parties, there was no actual grand jury testimony, so this is -- any subpoenas that were issued in the name of the grand jury, it should go before the supervising grand jury judge at the state level.

And second of all, even putting that aside, the party seeking materials may have to show a particularized and compelling need for the grand jury materials. And based on what I have just been hearing, I don't see how the plaintiffs have made out those particularized and compelling need for the grand jury --

THE COURT: Let me stop you for a moment, please.

If the criminal case file were to have been located, and if it had been produced, would it reflect in any way whether these individuals were called, formally or informally, to testify before the grand jury?

MS. ANTE: Yes, your Honor.

THE COURT: It would?

MS. ANTE: Yes.

THE COURT: And would that material have been produced to the plaintiff as part of this case file, or would that have been redacted?

MS. ANTE: Whether they were notified or subpoenaed,

the individuals, that's the bone of contention, yes or no, with number 6. And I have documents, if the Court wants to review it in-camera, what the subpoenas actually were as well as notifications.

THE COURT: OK. I'm sorry, I'll ask my question again because I'm not sure I understood your answer.

MS. ANTE: OK.

THE COURT: One of the things that you were just saying is that the request should be made in the court where the grand jury was convened.

MS. ANTE: That is correct.

THE COURT: And another thing that you were saying was that there has to be a particularized need. One of the particularized needs that has been advanced -- and I am saying nothing about whether it's enough or not, I'm just exploring it with you -- is that the file is now lost, and there is no way for them to get this information otherwise.

So my question to you is: Had this criminal file been found, and, more particularly, had it been produced to plaintiff in discovery in this case, would the plaintiff have received the information it now seeks; namely, whether any of the individual defendant officers was summoned formally or informally to testify before the grand jury?

MS. ANTE: No -- well, the criminal file in this case, the district attorney's office, we possess it.

THE COURT: OK.

MS. ANTE: All right.

THE COURT: Are we speaking of the same file, Mr. Farrar? What's the thing that was lost?

MR. FARRAR: That was the file from the criminal court.

THE COURT: So the answer is, no. The answer to my question is, no, the file that is lost did not have that information in it, did it? It would have just had the prosecution of the case, or not?

MR. FARRAR: It's my understanding that the criminal court files would note when a court date was held, and any notes from that, as well as the indictment and the disposition of charges, but it would not have anything regarding the grand jury.

THE COURT: OK. So, Ms. Ante, I wasn't clear with my question. That's why I asked it a second time.

What I was trying to get at was, I wanted to make sure that they were not prejudiced by not receiving the court file, for lack of a better term, because of information that would be produced in the court file, but you're not going to produce now. So now that I understand that's not an issue, please tell me again the reasons why you feel a particularized need has not been shown.

MS. ANTE: Well, again, the district attorney's

office, we're not a party to this, but they have to show a particularized and compelling need to go beyond the secrecy of the grand jury. They have to -- well, first of all, they have to show relevance. And they have almost the entire case file here, it has been produced to both parties. They have had depositions. They were allowed to ask the officers about whether they spoke with the district attorney, whether they were notified of the grand jury or not. They already have those documents.

So now they want -- we want proof from the grand jury, but they have everything else already. So they haven't made that showing, because they have other documents --

THE COURT: In fairness, Ms. Ante, what they're saying is the officers could not recall whether that notification had been made. That was the reason for my questioning to Mr. Farrar about why these folks were allowed to answer these questions, because if the point of grand jury secrecy is grand jury secrecy, then I would think you should be jumping up and down directing them not to answer if it's a question of whether they have been summoned or not. They've already been -- as I've been told -- I don't know, I have not read the transcripts -- they've already been asked those questions, and they've answered "I don't know," and that's why -- according to the plaintiff's counsel, that's why they believe they need this information, because they've asked the question, the witness

does not know, there is an answer, and you all have it.

So if you could respond to that.

MS. ANTE: Well, they could pursue it from the criminal defense attorney whether they showed up for the grand jury and no one came. The criminal defense attorney that represents the plaintiff in this civil matter, she would know that, and they could have deposed the criminal defense attorney.

They could have called the assistant district attorney. Nobody subpoenaed from my office the Assistant DA for depositions in this case.

THE COURT: Had the assistant district attorney been subpoenaed for a deposition in this case, would he or she have been permitted to give that information?

MS. ANTE: It depends if it was in regard with grand jury subpoenas, is it notifications, is it work product? I can't answer that question, your Honor, because that's very speculative.

THE COURT: I understand, but why I'm probing you on this, though, is, if you're offering these alternative routes as something where they could obtain the equivalent information, I need to know that they can obtain the equivalent information, and to the extent they can't, I need to know that as well.

So telling me they could have called the ADA is great,

except if we're going to be in the same position where they seek to depose this person, and the person says I can't tell you, then we're in the exact same position we're in now.

So that's not -- and it may be that that is legally appropriate. I'm just saying to offer that as a viable alternative is false or misleading because they can't actually get the information from that person.

MS. ANTE: There's also the -- if it is a notification as opposed to a subpoena, the notification is done through the police department, so there may be records from the police department regarding the receipt of the notification.

THE COURT: And you would not suggest that the schedules of the officers for a particular time period when the grand jury was in session would be subject to any of the privileges we have been discussing?

MS. ANTE: No, no.

THE COURT: I understand. All right.

Anything else?

MS. ANTE: In regard for the grand jury matters? No, your Honor.

THE COURT: OK.

MS. ANTE: And, again, I have the documents if you want to look at them.

THE COURT: I might. OK. Thank you very much.

Mr. Boyle or Mr. Oliver, may I hear you in reply on

this point, please?

MR. BOYLE: Yes, your Honor. One or two things: First, the defense counsel wouldn't know, because when -- or if the lawyers showed up, because defense counsel, by and large, aren't informed of that, the defense lawyer isn't in the grand jury. And sometimes in a criminal court case, particularly one that dragged on so long as this, you show up in court, and the district attorney gets up and says it's scheduled for presentation next term, your Honor, because the judge wants to know what's happening on the case. That's something that's routinely disclosed.

Obviously without the court file, we don't know whether those kind of representations were made. So to a certain extent, it is speculative, but there could have been some things in the court file which at least spoke about whether the case was going, what was going on with it, because certainly the criminal court judge wants to know -- this man is in jail -- what's going on with the presentation to the grand jury, and that's what we lack with the criminal court file as opposed to the -- the court file having been lost somewhere.

THE COURT: OK.

MR. BOYLE: Because we can't -- I don't mean to cut your Honor off. We can't even request the minutes of the various appearances because we can't learn who the court reporters were because that's in the court file.

THE COURT: I understand.

Let's just stand for a little bit longer, sir. I need to address the threshold issue that Ms. Ante has raised regarding what court this request needs to be made in. So I'm not going to talk about that with you because I haven't really looked at the issue, but I agree with her that for grand jury materials, it is typically the standard that one must make a particularized and compelling showing.

I was speaking with Ms. Ante, and you've heard me speak with her about what I thought your arguments were. To the extent I have misperceived them, I just want to make sure I understand what you identify as your compelling, particularized need.

MR. BOYLE: Yes, the Court has.

THE COURT: OK.

MR. BOYLE: If I could just add one other thing to that, though. I think before we get to the issue of what court it goes to, there has to be -- is this a matter occurring before the grand jury? For example, there's a whole slew of cases -- and I recognize it's not quite on point -- under FOIA where documents were requested from an agency and -- preexisting documents, and then they were put into the grand jury. The courts have held, well, that's not a matter occurring before the grand jury because it's preexisting material. And also, it applies to certain ministerial things,

which I would submit the notice to go to the grand jury -- even if the subpoenas were deemed to fall within grand jury secrecy, the administrative notice to Officer Charles to show up on a particular day certainly is not --

THE COURT: OK.

MR. BOYLE: -- and it would be appropriate --

THE COURT: You're not challenging, sir, that the subpoena would be a matter occurring before the grand jury?

MR. BOYLE: In a very -- I think there's a wrinkle to this case because it was never a presentation. And, frankly, I tried to look some of this up to see if there was no presentation, is it a matter occurring before the grand jury or was it just an administrative matter of an assistant district attorney as an officer of the grand jury filling out a subpoena.

So I wouldn't concede that totally, but clearly, if there was a presentation, certainly probably it would fall within the grand jury secrecy, the subpoenas would fall under the grand jury secrecy rules.

THE COURT: And it is only by dint of the fact that the presentation didn't happen, that you say it might not?

MR. BOYLE: It might not. And there also might have been waiver here as well by the fact that they did answer those -- the subject matter was gone into at their depositions. We're really only looking here for the defendant themselves,

not anything else.

THE COURT: I understand.

MR. BOYLE: Thank you.

THE COURT: Ms. Ante, could you speak, please -- oh, wait, Mr. Oliver wants to talk first.

MR. OLIVER: Very, very briefly.

THE COURT: Very, very briefly, sir, yes.

MR. OLIVER: Thank you.

Just with respect to number 3, which is the three grand jury subpoenas with the accompanying cover letters, I think we're actually missing a little bit of Local Rule 26.2 information, like dates and other information. Some of that might help either narrow the dispute or might help us in making arguments to the Court if it comes to briefing. But on the privilege log, there is no grand jury privilege that's being asserted for item 6, which is the notification for the officers to appear before the grand jury.

And item number 8 on the privilege log, which we're no longer pursuing, is medical records. It's described as medical records obtained by grand jury subpoena. So I think -- I infer that of the three grand jury subpoenas with the accompanying cover letters, perhaps one of them was related to the medical records that were obtained pursuant to a grand jury subpoena.

So we might really be left with two grand jury subpoenas with accompanying -- with a somewhat narrower issue

here at the end of the day than we have been talking about.

THE COURT: OK. Thank you, sir.

Ms. Ante, the comments that I have just heard from Mr. Boyle and Mr. Oliver suggest that there is a distinction to be made for purposes of the grand jury secrecy privilege between subpoenas and notifications to appear, and that one or both of them might not specifically be matters occurring before the grand jury.

If you have insight into this, particularly case law, I'd be interested.

MS. ANTE: I'm just going to the language of the case law here where it says if grand jury materials and subpoenas are issued in the name of the grand jury, an investigation has to be opened. It is a grand jury matter.

THE COURT: What about the notifications?

MS. ANTE: Notifications are not, your Honor. That is -- for civilian witnesses, it's typically subpoenas. For law enforcement, there's an agreement between the district attorney's office and NYPD to notify officers to come, but it is not deemed -- it's not a subpoena.

THE COURT: All right. But then --

MS. ANTE: It's a request.

THE COURT: The sixth category, notifications for officers to appear, on what basis is that being withheld?

MS. ANTE: It's our contention that that goes under

attorney work product, because it is going into our investigation of the case and how to pursue it.

THE COURT: No. Now I definitely need to hear more about this because I was doing fine with the grand jury secrecy. I understand this much less well as an expression of attorney work product.

Attorney work product documents and materials prepared in anticipation for litigation, you're suggesting that the selection of those individuals to notify for appearance in the grand jury is itself work product?

MS. ANTE: Yes. Who we choose to speak with, how we're going to proceed with a case, how we're going to investigate it, whether we're going to call someone, and of those people, which ones we are going to call, it's all part of our thought process in anticipation of litigation and whether to go into the grand jury or not.

THE COURT: You would agree with me, however, would you not, that unlike the attorney-client privilege, which tends to be waived only by things like waiver, there is -- the work product protection is not nearly as broad or as sacrosanct, and that showings can be made that would allow the disclosure of material otherwise considered work product?

MS. ANTE: That is correct, your Honor. It's the People's position under Federal Rule of Civil Procedure 26(b)(3)(A)(ii) that there has to be a showing of a substantial

need for the materials that bear upon the case, and without undue hardship, obtain their substantial equivalent by other means.

And, again, with regard to notifications, from what I have heard, the officers have already been deposed, and they do not recollect, but they have other avenues. They could, again, speak with the assistant district attorney, go speak with a criminal defense attorney. I believe it was said by plaintiff's attorney they cannot obtain the minutes because the case file has been lost, but the computer records have not.

THE COURT: How do you propose that they get those computer records? Who are they --

MS. ANTE: You go to the court clerk, and you ask, could I print out the calendar, the dates with the reporter's name. It's part of the computer system, and the court clerk can give it to you, and they can order the minutes to see what was said, because sometimes when a case is on for grand jury, which is what this case has been going on, it will be put on the record witnesses didn't show, or witnesses did show, or defense attorney consented for a disposition or -- it could be all the reasons for the adjournment would be put on the record.

THE COURT: That much, I understand. This is something I have less familiarity with. How would they know what days to go asking the Clerk of Court for?

MS. ANTE: You could to the court clerk, you give them

the docket number, and they will pull up, and they will give you the calendar, the dates that it was adjourned for, and usually with the court reporter, so they could order. So that's another avenue that they can pursue in this case.

And I believe it was also said that plaintiff believes that the officers may have waived the whole issue of grand jury confidentiality because there are questions about it. It's not whether a person can personally waive it, it's for a court to decide with the secrecy. So they do talk about it, but that doesn't mean there's a waiver of the grand jury privilege.

THE COURT: OK. Thank you.

Mr. Boyle or Mr. Oliver, can I hear from you on the court notes issue?

MR. OLIVER: Yes, your Honor. In part, because there is no criminal court file, there is nothing that we have that reflects what happened on the individual dates that the case was calendared for --

THE COURT: And let me stop you for a moment, sir.

MR. OLIVER: Of course.

THE COURT: Right now in this system, I can pull up this docket, and I can tell you what days there was a court proceeding and what has happened each time. There was an index number assigned to Mr. Jenkins' case, was there not?

MR. OLIVER: Well, there is a docket number, yes.

THE COURT: A docket number, excuse me.

So that particular docket number, one could go to a clerk and say, I would like the docket for this case; is that correct?

MR. OLIVER: It's sealed.

THE COURT: It is sealed?

MR. OLIVER: Right. The case is sealed, so with an unsealing order, we could perhaps obtain that information from the Office of Court Administration's computer system. That might be possible.

THE COURT: OK. I don't know that I have the ability to unseal, nor am I being asked to, but you have the ability to get a docket report of what happened?

MR. OLIVER: I mean, I think it's possible. The answer -- my answer is, I think it's possible. I'm not a hundred percent sure, but I presume it should be possible to pull that information from the system -- from the OCA system even though the case is sealed. What you would get would be a list, presumably what you usually get if you go onto the WebCrims system online, is a list of the appearances, the dates of the appearances, what part it was in, who the judge was, and who the court reporter was.

THE COURT: All right. And then what you are saying is you'd have to go back and --

MR. OLIVER: With unsealing orders. We would then need to go to the individual court reporters presumably with

unsealing orders to get them to transcribe each of the appearances.

It looks to me, based on the privilege log, like aside from the initial appearance, there were at least five appearances that -- or there were at least five appearances that there appear to be notes, court notes, from in the prosecutor's file.

THE COURT: OK. And your point to me, sir, is that you want the court notes because you don't have a court file?

MR. OLIVER: Well, we don't have a court file. The officers weren't present -- I assume they weren't present. They certainly didn't have any recollection as to what happened during the life of the case. And the court file would, at a minimum, reflect -- the court action sheet and the court file would, at a minimum, reflect some information about what happened on each appearance, what representations were made by the parties, but without access to the court file, we don't have access to any of that information.

And typically, I think the court notes include information from the assigned ADA to the ADA who's going to stand up in the part with what to say to the judge basically. And then I think sometimes the notes -- there are notes that also come back from the ADA who's standing in the part that go to the assigned ADA that reflect what the defense attorney said or what the judge said. All of that information, if this is

the only way that we have to get it, are these court notes at this point.

THE COURT: Well, absent the unsealing order and what we have just been talking about? As a theoretical matter, sir -- and I can appreciate there may be more difficulty in this than you wish to undertake -- you have the ability to find out the court dates, get the things transcribed, and see what happened, correct, sir?

MR. OLIVER: Theoretically. I think theoretically.

THE COURT: Again, without talking about the burdens involved. Let me speak to Ms. Ante on this.

Ms. Ante, I am less familiar than the parties here with the concept of court notes. I assume that they're being withheld on work product grounds?

MS. ANTE: That is correct, your Honor.

THE COURT: And, again, because I'm not sure what's in them, to my mind, to the extent that they are summaries of what happened -- the judge said this, the judge said that -- they're sort of work product that I would think would be less worthy of protection than other forms of work product. Is it your position -- and by you, I mean your employer -- your position that the mere selection of what to write down in these notes is itself work product?

MS. ANTE: That is correct, your Honor, because it would be a summary sometimes of what happened in the court. It

could be also a little directives, oh, pay attention to that or this may be a problem.

So it's our position that it's not opinion work product, but it is definitely fact work product. And, again, it's still controlled under 26(b)(3) where interest has to be showing of at least undue hardship. And there is -- there's been what's called a 160.50 waiver under the CPL in the state where the plaintiff has waived -- he wants his case unsealed, so it's quite easy to get an unsealing order, and just to go to the clerk and get the minutes.

THE COURT: Who actually can sign the unsealing order, a state court judge? Do I get to do one now based on this -- I'm not offering, I'm just wondering if it's -- no, I didn't think I could.

MS. ANTE: No, no. No, it's a state -- well, let me think about that.

MR. FARRAR: Your Honor, if I may respond to that?

THE COURT: Yes.

MR. FARRAR: The criminal court file can be obtained just with a release signed by the plaintiff, which is what we -- like, for instance, in this case, that's what we received from plaintiff's counsel. We forwarded it to the criminal court. Unfortunately, they couldn't find the file. However, had they found it, they would have produced it simply based on a signed release from the plaintiff pursuant to 160.50. So it

would seem to me that any records kept -- any computerized records kept by the Court would be able to be obtained by the same release.

THE COURT: Mr. Farrar, do you have the ability to access the electronic docket of this case, even though it is sealed?

MR. FARRAR: The criminal case?

THE COURT: You, sir, yes.

MR. FARRAR: No, your Honor.

THE COURT: Who does?

MR. FARRAR: My understanding would be the clerk of the criminal court.

THE COURT: OK. Fair enough.

So the release that was signed earlier in this litigation would not cover or would not permit the Clerk of the Court to produce this electronic docket of this information?

MR. FARRAR: I've never specifically sought the electronic information, but it's my understanding that it would still apply. If the entire court file can be obtained by a release signed by the plaintiff or whoever was the defendant in the criminal case, if that file can be obtained based on a release from them, logic would follow that any computerized records maintained by the same custodian would also be able to be released.

THE COURT: OK. Thank you.

MS. ANTE: I'm sorry, the criminal matter was pending in Part F. You would just go to the clerk of Part F and either give the waiver, or you go to the Part F judge and have him sign the unsealing order, or it may be a stipulation that all parties agree that it can be...

THE COURT: Before you sit down, these court notes, it seems to me that to the extent that there's a directive from the judge or so-and-so, you know, this attorney was present, this attorney was present, I just don't see the work product -- how that becomes work product. You're telling me it's fact. So I am going to ask you again: Is there nothing that can be excised from the court notes and produced to the plaintiff?

MS. ANTE: Can I have a moment?

THE COURT: Please.

(Pause)

THE COURT: I can understand the directive saying you should watch out for this because the judge is concerned about something or another, but a mere recitation of what happened, I'm not sure that's your strongest claim for work product, and I am not sure why that can't be produced.

MS. ANTE: Your Honor, there are directives to do this or to do that.

THE COURT: From whom to whom?

MS. ANTE: Some of them are from the assistant that was assigned the case, and some of them have the writing of the

assistant that was in the court part at the date giving it back -- what happened in the court back to the assistant, the assigned assistant.

THE COURT: Take what time you need to do this, but you're telling me now that there are no summaries, no recitations of fact that can be excised and produced to the plaintiff?

MS. ANTE: I could delete those things, your Honor.

THE COURT: There is something you can give them?

MS. ANTE: Yes, your Honor.

THE COURT: OK. Then, please, not right now, but please give that to them.

MS. ANTE: OK.

THE COURT: Thank you.

Let me suggest this: There are a number of issues that have been raised today, and I wanted to think about them, but I don't want to wait too long. So can the parties get me a transcript of this conference within the next week -- I wish not to kill the court reporter -- and then I will very promptly thereafter issue something deciding this. And certainly if the parties want to agree to some accommodation, I'm not going to stop you.

But let me understand what comes next because this, as I understand it, is the last thing in fact discovery.

Mr. Boyle, is that correct?

MR. BOYLE: It's the last thing in fact discovery. I do have an application regarding expert discovery when we're through with this.

THE COURT: Oh, no. Let's talk about it now.

MR. BOYLE: Your Honor, I served a few days ago Mr. Farrar the report of our neurological expert. It was untimely. It was untimely for this reason: The plaintiff saw the neurologist on April 15th of 2014. And this is -- and I will also say this was my responsibility in the case. Around mid-May, I started getting pretty ill. You probably can still hear it in my voice. I came down with first a viral, and then a bacterial bronchial infection, and was laid up for a few weeks and actually was with family in Florida. I made a mistake of before I was well, getting on a plane, that proceeded to turn into a sinus infection, which I'm still taking antibiotics for. I had high fever for several days and was basically out of commission.

I knew that this -- I was expecting this report, and when I finally did get to the office late last week -- and I have only been working full time this week -- I contacted the doctor, and his office faxed me the report, and it looked like it was sent to my old address, 299 Broadway, not 351 Broadway.

THE COURT: Yes, which, by the way, is still your address for ECF purposes.

MR. BOYLE: And, you know, I tried -- actually, that's

a long story. I tried to talk to the ECF clerk the other day about that.

So this is why -- his report was dated a few weeks ago. This was why I didn't get it. I spoke to Mr. Farrar prior to today's proceeding. He was going to leave it to the discretion of your Honor. But I did mention to Mr. Farrar, should the City want their own expert, I could produce Mr. Jenkins whenever that's available and whenever they can arrange that, and would consent to any further -- consent to their needs. This was something that was totally my responsibility. I would ask the Court to consider. It was primarily because it was health related, and it was just something I didn't get to in the mess that I was going through.

So it is --

THE COURT: How late was it, sir?

MR. BOYLE: It was about two and a half weeks late.

MR. FARRAR: I believe in the last order, your Honor had ordered expert discovery to close on June 3rd. I got this report yesterday from plaintiff's counsel.

THE COURT: All right. Let's start with the easy question.

Mr. Farrar, do you object to this late disclosure of an expert witness -- or expert witness report? Excuse me.

MR. FARRAR: I would note my objection. Of course, I'll defer to your Honor, and I would ask that should the Court

consider this, that we be offered an opportunity to examine the plaintiff and conduct some additional discovery on this subject.

THE COURT: Let me hear -- I'm inclined, given the recitation I've just received of why it was late, and given that there's no sense that this was in any way strategic, or malicious, or even underhanded, to let it go in late. I don't wish to prejudice you, and I'm not going to do that. The question is what are you contemplating in terms of additional discovery?

MR. FARRAR: Yes, your Honor. I would need -- having just received this yesterday, I would need a little bit more time to consider that and discuss with my office about what potential additional discovery we may be seeking. But I can say at this point, I think we would certainly want the option to have Mr. Jenkins appear for a medical exam at some point, and have those reports reviewed by potentially a defendants' expert and reserve the right to reopen Mr. Jenkins' deposition for purposes of this issue.

THE COURT: How long a period of time are you seeking, sir? And don't be greedy.

MR. FARRAR: Yes, your Honor. I would probably need a little more time just to figure out exactly how long all this would take. It's certainly not our intention to drag this out any longer than needs to be. I understand that there are

several steps that need to happen.

First, we would need to confer -- first, I would need to confer with my office and find out exactly what type of discovery we do intend to take. Then we would need to coordinate with plaintiff's counsel to create a date for plaintiff to appear, and I don't know where -- I'm sorry, I don't know where plaintiff is right now, if he can be produced --

THE COURT: He can be.

MR. FARRAR: -- quickly.

MR. BOYLE: He can be.

THE COURT: Yes, he can.

MR. FARRAR: And once he is examined, it will probably take 30 days for an expert to get an expert report, at least in previous cases.

THE COURT: See, this is the trouble: Did you have no idea that this report was coming, sir, or is it simply that it was late?

MR. FARRAR: Well, plaintiff's counsel had previously indicated they were considering an expert report.

THE COURT: Exactly. So I don't wish to give you what I think you're asking for, which is like 60 days. I was going to give you a maximum of 30, so I was going to tell you to get your expert now or decide in the next 24 hours whether you need it, because I appreciate it's two, maybe three weeks late, but

you knew for some period before then that they were contemplating having an expert. It could not have surprised you when the expert witness report came in. Simply its lateness, not its fact. So I think you'll get 30 days and not more than that. And use it wisely, sir.

MR. FARRAR: Yes, your Honor. I would just add, when the deadline had passed, and I hadn't heard from them -- and I had made several attempts to contact plaintiff's counsel by email to find out if they were still intending to proceed with expert discovery -- having not gotten a response, I was a little surprised to get the report yesterday. But I understand your Honor's point, and we will work as quickly as we can.

THE COURT: All right. Thank you.

What are --

MR. BOYLE: Thank you.

THE COURT: So assuming -- look, you'll get my decision regarding the fact materials in about a week or so. Expert witness discovery will close in about 30 days. What are the next steps? Does either side contemplate dispositive motion practice, or does either side contemplate a fruitful settlement discussion, or should I just set a trial date?

Mr. Farrar?

MR. FARRAR: Your Honor, we do contemplate a partially dispositive motion and are prepared to proceed with that once all -- any outstanding issues are resolved.

With respect to settlement, we have been open and hopeful to try to reach a resolution in this case for a long time. We remain willing to engage in settlement discussions. I haven't gotten any indication from plaintiff's counsel, at least not lately, that that's something that they would be open to, but I'm still hopeful that a resolution can be reached.

THE COURT: All right. Stay there for just a moment.

Mr. Boyle, what's up with settlement? Do you not wish to? Now that you're well, sir.

MR. BOYLE: That would make me much better quickly.

Your Honor, we're always open, and it's a give -- I'll be frank with the Court, and maybe -- it's a lot of give-and-take with my client, and I would rather just not go any further than that. But those efforts will continue on my end, and then I'm certainly amenable to any discussion with Mr. Farrar. It may be best, to show that it's moving along, that any dispositive motion date be set, and if that happens, at least that's moving along.

THE COURT: Yes. Are the parties in a position where they could now -- and I hope the folks for my 2:30 will wait just a few moments. Can I have an understanding now of what the parameters of your partial dispositive motion will be? I think I know, but I want to hear, and assuming that they are what I think they are, I can dispense with my premotion conference requirement and just build into the order I

ultimately issue in this case a schedule for summary judgment motions.

So, Mr. Farrar, would this be on the issue of probable cause, sir?

MR. FARRAR: Yes, your Honor. And particularly it would be in regards to the parole violation that's at issue here. Much of plaintiff's incarceration damages are the result of a parole violation, not as the result of these criminal charges, and we would certainly move to remove those damages from consideration at trial. That's the main one I'm contemplating at this point.

THE COURT: Can you just explain to me with a little more detail how you can distinguish between the damages relating to the arrest in this case and the damages relating to the parole violation?

MR. FARRAR: Yes, your Honor. After plaintiff was arrested, shortly after his arrest, his parole officer filed a -- I believe the term is a pre-violation report, something along those lines, and plaintiff was -- there were essentially charges -- it's a charging instrument for violating plaintiff's parole.

A hearing was held before a state court judge, and ultimately, it was determined that plaintiff did violate his parole. He, as a result, was incarcerated for a period of, I believe, around three years as a result of that violation.

Plaintiff was on parole at the time regarding a conviction for, I believe, manslaughter about 20 years prior to this incident.

THE COURT: I'm sorry for requesting this clarification, but the parole violation was found to be valid irrespective of the progress or lack of progress of the criminal action that is at issue in this case?

MR. FARRAR: Yes, your Honor. And we would argue that as a result, that the parole violation, which is not being contested in this lawsuit, was the reason for many of his damages and his incarceration, not the arrest by the defendant officers.

THE COURT: OK. Thank you.

And Mr. Boyle or Mr. Oliver, do you want -- if you have a response to that, I'd be interested in it. I certainly understand, sir, that this may be the first you're hearing of these arguments, so I won't expect the most detailed of responses.

MR. BOYLE: We have been aware of this issue, and actually, I've done some preliminary research into it and have several arguments as to why, notwithstanding -- and I think one of the claims would be Heck versus Humphrey -- that that claim does survive in this case.

THE COURT: Oh, because of -- especially because of the Poventud decision that just came out from the Second Circuit en banc.

MR. BOYLE: I think it's an interesting legal issue, and it is a discrete one, if that's the only thing that's going to be in their dispositive motions, but there are certainly ways around Heck versus Humphrey, I believe, in this case which we would address.

THE COURT: Sir, just going back to your prior point about dealing with your client, and I understand that that is a relationship you wish to preserve and have happy, if and to the extent that you need to tell him that you are before an especially irascible, nasty judge, and that that will aid you in resolving this case and thereby improving your health, please do so, because it may be easier than the summary judgment briefing schedule we're setting up and the summary judgment practice we're all going to be embarking upon.

MR. BOYLE: And I will certainly order the transcript now, so I can cover this.

THE COURT: All right. I appreciate that.

Yes, Mr. Farrar.

MR. FARRAR: Just very briefly to follow up as far as the scheduling goes, and I appreciate Mr. Boyle's comments and concerns with regard to settlement, however, to the extent that that is still an option on the table -- and I hope that it is -- I would ask that any settlement conference or anything of that nature occur as soon as possible before additional briefings take place and additional costs and expenses incur.

THE COURT: I'm not disagreeing with you, sir, and I think it should happen before you figure out what to do with the expert discovery. But the problem is, I can't make his client want to have a settlement conference. He needs to talk to his client about whether it is an option that he's interested in pursuing.

So know this: When I set the schedule in the order that I will eventually issue, I will keep that in mind and try to have a little bit, although not too long a period, of a cooling off period to allow the folks to consider whether this is a possibility.

I will just tell the parties that to the extent you would like me to participate in the settlement discussions as a mediator or an objective third party, I am here. To the extent you would like the magistrate judge assigned to the case to do it, that is absolutely fine as well, and I see that it is Judge Peck. So let me know, and within a day of your letting me know, I can issue the order of referral. And I can also -- if it is appropriate and the parties want me to, I can place a call to him personally to ask that this be moved up to sort of the top of his docket because of the issues that you've just raised with me. I cannot guarantee that he will, but I can certainly ask him nicely.

So just know that all of these things exist because I'm not interested in the parties wasting their own resources,

and, more importantly, wasting mine if, ultimately, we're just going to have a settlement. And as I've said to someone earlier in the day, I enjoy trials, I'm fine with trials, we can have a trial, but if the parties ultimately are not going to have one, then I question, and perhaps you question, whether it is worth having all of these proceedings and all of this work discovery-wise, motion practice-wise, only to get to the same place we were going to be anyway.

So you all know that already. I don't need to tell you that. You will have the transcript, you can show your respective clients that, and I will just issue an order. Probably right after I resolve the discovery issue, I'll try and build that into the same order.

So is there anything that I am not discussing with the parties that I should be?

Mr. Boyle?

MR. BOYLE: No. Thank you, your Honor.

THE COURT: Mr. Farrar?

MR. FARRAR: No. Thank you, your Honor.

THE COURT: And, Ms. Ante, thank you very much.

Could you please leave with me the materials that we were talking about in the first part of our conference? I don't think I need to see the notes because you've already identified things that can be produced to Mr. Boyle, but I'd be interested in the materials that you believe are subject to the

grand jury privilege and to work product.

MS. ANTE: Yes, your Honor.

THE COURT: All right. Thank you. And we will get them back to you promptly.

MR. BOYLE: Thank you, your Honor.

THE COURT: Thank you very much.

MR. FARRAR: Thank you.

* * *